STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT J. NEWMAN, JR.,

Defendant-Appellant.

UNPUBLISHED
March 21, 2000

No. 208946
Wayne Circuit Court
Criminal Division
LC No. 96-502864

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment on the first-degree murder conviction and a consecutive two years' imprisonment on the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict him of first-degree murder. We disagree. We review claims of insufficient evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

First-degree murder requires an intentional killing accompanied by premeditation and deliberation. MCL 750.316(1)(a); MSA 28.548(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753, (1998); *Anderson, supra* at 537. Factors evidencing premeditation are: (1) the prior relationship between the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing; and (4) the defendant's conduct after the victim's death. *Id.* When the evidence establishes that a fight occurred before a killing, there must exist

"a thought process undisturbed by hot blood" in order to convict the defendant of first-degree, premeditated murder. *Plummer, supra* at 301. Without such a thought process, the evidence is as consistent with an unpremeditated killing as with a deliberate and premeditated killing following an opportunity for cool-headed reflection. *Id*. at 301-302.

The evidence at trial established that on the night of Kristina Bell's death, she and defendant had been arguing about finances. Deborah Ann Hooks, a housemate of defendant and Bell, testified that following this argument defendant and Bell went to pick up a truck, leaving the house in Bell's van. Hooks, testified that defendant seemed very impatient and that just before leaving the house he told Hooks, "it's over, it's over." He also told Hooks to listen for the phone and tossed the phone into her room. Defendant had never previously given her the phone before he left.

Bell was shot twice, once in the back of her neck and once in her back. Defendant testified, consistent with his statement to police, that he and Bell argued while in the van, that Bell took a gun out of her purse, and that as he attempted to get the gun away from her it went off twice. However, there was no evidence of close range firing and no evidence of shots fired inside the van. Bell's body was discovered leaning up against the front tire of the van in a pool of blood, and although blood was discovered on the outside of the van, none was discovered inside. Also inconsistent with his assertion that this was an accidental shooting, defendant did not call 911 after the shooting, instead calling Hooks to come pick him up. Further, defendant did not attempt to attract the attention of police officers when he saw two police cars pass by before Hooks arrived. Finally, after telling Hooks that he had accidentally shot Bell, defendant asked her what she thought of him; Hooks testified that when she replied that it made her wonder what he would do to her, defendant stated, "I'd never do that to you."

Viewed in the light most favorable to the prosecution, we find this evidence sufficient to justify a rational trier of fact in finding beyond a reasonable doubt that defendant committed first-degree murder. *Wolfe, supra* at 515.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must show that but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different and must overcome the strong presumption that counsel's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant contends that his trial counsel was ineffective because she failed to file a motion to suppress defendant's second statement. However, actions appearing erroneous from hindsight do not constitute ineffective assistance if taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *Pickens, supra* at 344 (Mallet, J., concurring and dissenting). Defendant's statement to the police was voluntary. Defendant testified that he was read his *Miranda*[1] rights prior to making the statement. One of the rights informed defendant that he had a right to an attorney. Defendant signed the document indicating that he voluntarily waived his right to an

attorney. Furthermore, the statement was exculpatory and comported with his defense at trial. Defense counsel did not believe that a motion to suppress would have been successful and instead utilized the statement to defendant's advantage at trial. This decision was a matter of trial strategy. This Court will not substitute its judgment for that of trial counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant also contends that his counsel was ineffective because she failed to convey a plea offer for second-degree murder. An attorney's failure to convey a plea offer to a client may constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988). The defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that defense counsel failed to communicate the offer. *Id*. at 242. Here, no plea offer for second-degree murder was ever made or discussed. Therefore, defense counsel could not have conveyed such an offer to defendant.

Defendant next argues that the trial court should have instructed the jury on voluntary manslaughter as defendant requested. Again, we disagree.

A trial court, if requested, must instruct the jury on a cognate lesser included offense if the evidence adduced at trial would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). There must be more than a modicum of evidence to warrant giving the instruction; there must be sufficient evidence to justify a conviction of the lesser offense. *Id.* A defendant may be convicted of voluntary manslaughter for an intentional killing if it was committed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could have controlled his emotions. *Id*. at 388.

Defendant presented evidence at trial that he accidentally shot Bell during a struggle for the gun. Without an intent to kill, defendant could not have been convicted of voluntary manslaughter and the evidence adduced at trial would not have been sufficient to support a voluntary manslaughter conviction. *Id.* at 387. In any event, any error in failing to instruct the jury on involuntary manslaughter would have been harmless because the jury was instructed on two lesser included offenses and nevertheless found defendant guilty of the charged greater offense of first-degree murder. *People v Beach*, 429 Mich 450, 481; 418 NW2d 861 (1988).

Defendant's final issue on appeal is that the prosecutor engaged in prosecutorial misconduct by using the prestige of his office and personally vouching for the veracity of his case. We disagree. Because defendant failed to preserve this issue for appeal, review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the prosecutor's comments or if the failure to consider the issue would result in a miscarriage of justice. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

A prosecutor cannot utilize the prestige of his office in an effort to convict a defendant. *People v Lucas*, 138 Mich App 212, 221; 360 NW2d 162 (1984). However, a prosecutor's remarks are reviewed in light of arguments made by defense counsel. *People v Phillips*, 217 Mich App 489, 497;

552 NW2d 487 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). An impermissible remark made by a prosecutor in response to a comment previously made by defense counsel does not require reversal. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

The prosecutor's comments in this case were responsive to defense counsel's statements that the prosecutor had overcharged the case and that the facts did not justify a first-degree murder charge. The prosecutor did not vouch for his case or use the prestige of his office to his advantage in making these remarks. Moreover, the trial court instructed the jury to consider only the evidence presented in the case, and informed the jury that the attorneys' arguments were not evidence. Juries are presumed to have followed the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prosecutor's comments did not result in a miscarriage of justice.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).